

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	
	:	CRIMINAL NO. 02-254-01
v.	:	
	:	CIVIL ACTION NO. 04-4243
LEONID CHERNYAK	:	

SURRICK, J.

AUGUST 12, 2005

MEMORANDUM & ORDER

Presently before the Court is Defendant Leonid Chernyak's Habeas Corpus Motion Under 28 U.S.C. § 2255/Motion to Vacate, Set Aside, or Correct Sentence By A Person In Federal Custody (Doc. No. 400). For the following reasons, Defendant's Motion will be denied.

I. BACKGROUND

On March 7, 2003, Defendant entered a plea of guilty to one count of violating RICO, one count of RICO conspiracy, and one count of naturalization fraud.¹ (Doc. No. 253.) The Guilty Plea Agreement provided that Defendant would be permitted to file a direct appeal of his sentence under certain conditions, but that he voluntarily and expressly waived any right to collaterally attack his conviction or sentence. Specifically, Paragraph 12 of the Agreement stated:

In exchange for the undertakings made by the government in entering this plea agreement, the defendant voluntarily and expressly waives all rights to appeal

¹ Defendant was originally charged with forty-six (46) counts arising from his alleged involvement in, and leadership of, a racketeering enterprise known as the "KGB." (Doc. No. 1.) The Government alleged that as a leader of the enterprise, he was involved in numerous acts of drug trafficking, extortionate collection of credit, robbery, and use of the mail to defraud insurance companies. (*Id.*) Defendant was also charged with naturalization fraud arising from false representations in an application for naturalized citizenship to the Immigration and Naturalization Service. (*Id.*)

or collaterally attack the defendant's conviction, sentence, or any other matter relating to this prosecution, whether such a right to appeal or collateral attack arises under 18 U.S.C. § 3742, 28 U.S.C. § 1291, 28 U.S.C. § 2255, or any other provision of law.

A. Notwithstanding the waiver provision above, if the government appeals from the sentence, then the defendant may file a direct appeal of his sentence.

B. If the government does not appeal, then notwithstanding the waiver provision set forth in paragraph 12 above, the defendant may file a direct appeal but may raise only claims that:

1. the defendant's sentence exceeds the statutory maximum; or
2. the sentencing judge erroneously departed upward from the otherwise applicable sentencing guideline range.

(*Id.* ¶ 12.)

At the guilty plea hearing, Defendant acknowledged under oath that by pleading guilty, he was admitting that he committed the crimes in Counts 1, 2, and 48 of the Indictment and that he was admitting commission of or aiding and abetting the commission of twenty-two (22) acts of racketeering outlined in the Indictment, including acts related to extortion, robbery, distribution of illegal drugs, and mail fraud. (Doc. No. 390 at 15-16.) The Plea Agreement also stated, and the Defendant acknowledged at the plea hearing, that he understood that the total statutory maximum sentence for the three (3) counts that he was pleading to was fifty (50) years in prison, three (3) years of supervised release, \$750,000 in fines, and special assessments of \$300. (*Id.* at 14-19; Doc. No. 255 ¶ 8.)

The sentencing hearing was held on October 9, 2003. Based upon an offense level of 34 and a criminal history category of two (II), the Federal Sentencing Guidelines provided a sentencing range of 168 to 210 months. The Guidelines also provided for a fine range of \$17,500 to \$175,000. At sentencing, Defendant objected to the Presentence Report ("PSR") determination of his status as an organizer or leader, the groupings of the offenses, and the PSR's

calculation of his criminal history. We overruled these objections. (Doc. No. 354.) A sentence of incarceration for a period of 210 months was imposed, followed by three (3) years of supervised release. Restitution in the amount of \$17,990.81 was ordered and Defendant was directed to pay special assessments of \$300. No fine was imposed. (*Id.* at 46-47.)

On September 7, 2004, Defendant filed the instant pro se Motion, claiming that his guilty plea was constitutionally invalid in light of the Supreme Court's decision in *Blakely v. Washington*, 124 S. Ct. 2531 (2004). (Doc. No. 400 at 5.) Defendant claims that he was not aware of his "Blakely Rights" at the time of his plea and thus "could not have knowingly waived [his] rights." (*Id.*) In a response to the Government's brief in opposition to the Motion, Defendant asserts that enforcement of the waiver of his right to appeal would constitute a "miscarriage of justice" and a violation of his Sixth Amendment rights under *Blakely* and *United States v. Booker*, 125 S. Ct. 738 (2005).² (Doc. No. 413.)

II. STANDARD OF REVIEW

Section 2255 permits a prisoner in federal custody to challenge the validity of his sentence. 28 U.S.C. § 2255 (2000); *see also United States v. Eakman*, 378 F.3d 294, 297 (3d Cir. 2004). The prisoner has one year from the latest of the following acts to file a petition under § 2255:

(1) the date on which the conviction became final; (2) the date on which the impediment to making a motion created by government action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action; (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been

² Defendant initially argued that his plea was invalid because of *Blakely*. That argument is now governed by *Booker*, which applied the *Blakely* rationale to the Federal Sentencing Guidelines.

newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; and (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2255.

It is within the Court's discretion to hold an evidentiary hearing on a § 2255 motion. *Gov't of the Virgin Islands v. Forte*, 865 F.2d 59, 62 (3d Cir. 1989). A hearing need not be held, however, if the "motion and the files and records conclusively show that the prisoner is entitled to no relief." 28 U.S.C. § 2255; *see also United States v. Day*, 969 F.2d 39, 41-42 (3d Cir. 1992).

III. DISCUSSION

A defendant may waive his right to appeal pursuant to a plea agreement as long as he does so knowingly and voluntarily and the waiver does not effect a miscarriage of justice. *United States v. Khattak*, 273 F.3d 557, 563 (3d Cir. 2001). A defendant may also waive the right to pursue a collateral attack of his conviction or sentence. *United States v. King*, Civ. A. No. 04-4991, 2005 WL 914745, at *2 (E.D. Pa. Apr. 18, 2005).

Here, Defendant knowingly and voluntarily agreed to waive his right to appeal and to collaterally attack his conviction and sentence. In his Guilty Plea Agreement, Defendant agreed that:

In exchange for the undertakings made by the government in entering this plea agreement, the defendant voluntarily and expressly waives all rights to appeal or collaterally attack the defendant's conviction, sentence, or any other matter relating to this prosecution, whether such a right to appeal or collateral attack arises under 18 U.S.C. § 3742, 28 U.S.C. § 1291, 28 U.S.C. § 2255, or any other provision of law.

(Doc. No. 253 ¶ 12.)

Defendant does not allege that he entered into the plea agreement involuntarily. Rather, he argues that he did not “knowingly” waive his rights because he, his attorney, and the court were not aware of his “Blakely rights.” (Doc. No. 400 at 5.) Initially, we note that Defendant’s conviction became final on November 9, 2003. This was prior to the Supreme Court’s decisions in both *Blakely* and *Booker*. The Third Circuit has recently held that *Booker* does not apply retroactively to § 2255 motions when the judgment was final prior to January 12, 2005, the date *Booker* was decided. *Lloyd v. United States*, 407 F.3d 608, 615 (3d Cir. 2005). Accordingly, Defendant cannot claim that his plea was “constitutionally invalid” based upon *Blakely* and *Booker*.

Defendant alleges that he did not waive his rights “knowingly” and that enforcement of the waiver would constitute a miscarriage of justice under *Khattak*. (Doc. No. 413 ¶ 1.10.) The Third Circuit addressed these issues in *United States v. Lockett*, 406 F.3d 207, 214 (3d Cir. 2005). In *Lockett*, the Court held that enforcement of a waiver such as Defendant’s does not constitute a miscarriage of justice and that defendants who have agreed to a waiver are not entitled to withdraw their plea or to resentencing after *Booker*. The defendant in *Lockett* entered into a guilty plea agreement, waived certain rights to appeal, and was ultimately sentenced to sixty-six (66) months in prison for drug-related offenses. In his § 2255 motion, Lockett requested that the court invalidate the sentence because at the time of his guilty plea he did not anticipate the Supreme Court’s decision in *Booker*. Citing the Supreme Court’s decision in *Brady v. United States*, 397 U.S. 742, 757 (1970), which held that changes in the law benefitting a defendant subsequent to the plea agreement do not make the agreement less binding, the *Lockett* court concluded that the “possibility of a favorable change in the law occurring after a

plea agreement is merely one of the risks that accompanies a guilty plea.” *Lockett*, 406 F.3d at 214. “To be more succinct, ‘a valid plea agreement, after all, requires knowledge of existing rights, not clairvoyance.’” *Id.* (quoting *United States v. Bradley*, 400 F.3d 459, 463 (6th Cir. 2005)). Defendant here faced the same risk when he signed the Guilty Plea Agreement and entered his guilty plea on March 7, 2003. We find that no miscarriage of justice is effected by enforcing Defendant’s plea agreement in which he failed to foresee the change of law brought about by *Blakely* and *Booker*.

Because the record “conclusively show[s] that the prisoner is entitled to no relief,” 28 U.S.C. § 2255, the Motion is denied without a hearing.

An appropriate Order follows.

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LEONID CHERNYAK	:	

ORDER

AND NOW, this 12th day of August, 2005, upon consideration of the Defendant's Habeas Corpus Motion Under 28 U.S.C. § 2255/Motion To Vacate, Set Aside, Or Correct Sentence By A Person In Federal Custody (Doc. No. 400), it is ORDERED that the Motion is DENIED.

IT IS SO ORDERED.

BY THE COURT:

S:/R. Barclay Surrick, Judge